GARLAND NOMINATION/United States Circuit Judge

SUBJECT: **Nomination of Merrick B. Garland, of Maryland, to be United States Circuit Judge for the District of Columbia Circuit.**

ACTION: NOMINATION CONFIRMED, 76-23

SYNOPSIS: Merrick B. Garland was born November 13, 1952, in Chicago, Illinois. He received an A.B. degree from Harvard College in 1974 and a J.D. degree from Harvard Law School in 1977. His employment history includes the following: 1977-1978, Law Clerk, Judge Friendly, U.S. Court of Appeals, 2d Circuit; 1978, Summer Associate, Arnold & Porter; 1978-1979, Law Clerk, Justice Brennan, U.S. Supreme Court; 1979-1981, Special Assistant to the Attorney General, U.S. Department of Justice; 1981-1989, Partner and Associate, Arnold & Porter; 1989-1992, Assistant U.S. Attorney, District of Columbia; 1992-1993, Partner, Arnold & Porter; and 1993-1994, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

Those favoring confirmation contended:

Argument 1:

Senators do not question Merrick Garland's suitability to serve as an appellate judge. For Republicans, who have been dismayed at some of the shoddy decisions and judicial activism that have come from judges who were appointed by President Clinton, the nomination of someone of this caliber is something of a relief. Nothing in Merrick Garland's record indicates that he will be a judicial activist without respect for the law or the Constitution. Still, many Senators oppose confirmation. Their opposition is based solely on the belief that the position for which he has been nominated on the District of Columbia Circuit is unnecessary and should be eliminated. We disagree. In our opinion, our colleagues have been misled by statistics. They have looked at the 12 appellate circuits

(See other side)

YEAS (76)

Republican (32 or 58%)		Democrats (44 or 100%)	
Abraham	Kempthorne	Akaka	Johnson
Bennett	Lugar	Baucus	Kennedy
Bond	Mack	Biden	Kerrey
Campbell	McCain	Bingaman	Kerry
Chafee	Murkowski	Boxer	Kohl
Coats	Roberts	Breaux	Landrieu
Cochran	Roth	Bryan	Lautenberg
Collins	Santorum	Bumpers	Leahy
D'Amato	Smith, Bob	Byrd	Levin
DeWine	Smith, Gordon	Cleland	Lieberman
Domenici	Snowe	Conrad	Mikulski
Gorton	Specter	Daschle	Moseley-Braun
Hatch	Stevens	Dodd	Moynihan
Hutchison	Thomas	Dorgan	Murray
Inhofe	Thompson	Durbin	Reed
Jeffords	Warner	Feingold	Reid
		Feinstein	Robb
		Ford	Rockefeller
		Graham	Sarbanes
		Harkin	Torricelli
		Hollings	Wellstone
		Inouye	Wyden

NAYS (23)

Republicans (23 or 42%)	Democrats (0 or 0%)
Allard	
Ashcroft	
Brownback	
Burns	
Coverdell	
Craig	
Enzi	
Faircloth	
Frist	
Gramm	
Grams	
Grassley	
Gregg	
Hagel	
Helms	
Hutchinson	
Kyl	
Lott	
McConnell	
Nickles	
Sessions	
Shelby	
Thurmond	

NOT VOTING (1)

Republicans (0)	Democrats (1)
	Glenn-[2]

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

in America, and have noted that the average number of appeals handled by judges in the District Circuit, 123, is by far the lowest. Also, they have noted that the District Circuit is one of the largest in terms of the number of judges it is authorized to have (12; 2 of the seats are now vacant). From these facts they have made the simple, and wrong, assumption that the judges on the District Circuit are underworked. They then say that judges from other circuits agree with them, and that we should not fill either of the current vacancies. In response to these arguments, District Circuit judges have higher than average numbers of complex cases to consider. For other circuits, large percentages of the cases that they hear are frivolous suits from prisoners that can be dismissed quickly; District Circuit judges hear few such cases. Instead, they hear disproportionately high numbers of complex administrative cases that take a great deal of time to consider. As for the argument that judges on other circuits have said that it is better to operate with few judges and high caseloads, we note that the judges on the District Circuit disagree. They believe 11 judges are necessary. Basically, they agree that their caseload has declined, so they should be reduced from 12 judges to 11 judges, but they do not believe that they should go below that number. We defer to their judgment.

Those arguments aside, we also need to make a few comments about the pace at which Republicans have been considering President Clinton's judicial nominees from the 104th Congress through the present. We need to make these comments because Democrats have been twisting the statistics on that pace in a disingenuous, deceptive manner. Their argument is that Republicans are stalling the approval of judicial nominees for vacant posts, and as a result we are reaching a crisis situation in the ability of Federal judges to handle the caseload. Their argument is based on the low number of judges confirmed in the 104th second session and the fact that only 2 judges have been reported by the Judiciary Committee this year. By themselves, these facts seem to show that Republicans are refusing to consider Clinton nominees, but when one looks at the rest of the picture one finds that these facts in isolation present a gross distortion of reality. The first fact our Democratic colleagues ignore is that it is not possible to confirm people unless they have been nominated. Last year President Clinton nominated only 21 judges, and the Senate confirmed 17 of them. The second fact our Democratic colleagues ignore is that during President Clinton's first term more judges were confirmed (202) than were confirmed under President Bush (194), President Ford (65), or President Reagan in his first term (164). Seventy-five of those judges were confirmed by the Republican-led 104th Congress, and nearly all of them were confirmed by voice vote. The third fact that our Democratic colleagues ignore is that the reason that the 104th Congress filled less vacancies than the 103rd is that there were fewer vacancies. In the 103rd Congress, President Clinton so loaded up the judiciary with his activist judges that the vacancy rate at the close of the 103rd Congress was just 7.44 percent, which the Justice Department bragged as being equal to a "full employment" level for the Judiciary. It certainly was much lower than the 14.89 percent and 12.88 percent rates at the start of the 102d and 103rd Congresses, after Democratic Senates had finished dealing with Republican nominees. Are our Democratic colleagues prepared to say that those numbers show that they were stalling, or perhaps do they admit that just looking at that one measure results in a facile analysis? We look at each situation, and we look at all parts of the situation. For instance, we are not prepared to say that Senator Biden played politics by having a much higher vacancy rate at the end of the 102nd, when he was Chairman of the Judiciary Committee. Instead, in his defense, we note that he recommended increasing the number of Federal judges by 84 when President Reagan was in office, knowing full well that President Reagan would nominate conservative judges, and many of the nominees who were not considered in the 102nd Congress were nominated too late to be considered. These facts indicate that the high vacancy rate statistic is not proof of political gamesmanship. The fourth fact that our Democratic colleagues ignore is that at the end of the 104th Congress the vacancy rate had not effectively changed from the rate at the end of the 103rd; instead of 63 vacancies, there were 65. In other words, Republican Senators did not do to a Democratic President what Democratic Senators did to Republican Presidents; the vacancy rate did not climb to 13 percent or 15 percent, it stayed at what the Justice Department calls "full employment." The fifth fact that our Democratic colleagues ignore is that normal attrition and the Senate's schedule have always resulted in an increase in vacancies at the start of a Congress. During the many-month span from a Congress' adjournment until the Judiciary Committee starts reporting nominees (usually in April), vacancy rates naturally climb. This year, the Judiciary Committee is way ahead of schedule compared to prior, Democrat-controlled Congresses, when the first nominee hearings typically were not even held until mid-March or April. The vacancy rate of course has risen from its 7.7 level at the end of the 104th; any other result would have been impossible.

Though the charge that Republicans have delayed judicial nominees is demonstrably false, we daresay that the American people may have been better served if it were true. Justice was not served by the Clinton judge who went easy on a criminal because the woman murdered by that criminal did not suffer enough, nor was it served by the Clinton judge who said that a bomb was not really a bomb because it failed to detonate and kill anybody, nor was is served when a Clinton judge in New York (Judge Baer) went to herculean lengths to exclude evidence in a major drug case. When we Republicans have criticized these decisions, President Clinton's response has been that we have no right to criticize because we voted in favor of confirmation. If that is the standard that he wishes to use, then so be it. We will not follow the traditional practice of deference if he is going to imply that our confirmation votes are the equivalent of endorsements of his nominees' extremist views. We will subject his nominees to greater scrutiny, and we will vote against activist judges.

As we said at the outset, however, this particular nominee does not fall into this category. We intend to consider each nominee on his or her merits. Merrick Garland deserves confirmation, and we will vote accordingly.

Argument 2:

Republicans have no reason to oppose this nominee. They just do not want to confirm any judges. Since they took over Congress they have gone to great lengths to block the confirmation of all judges. Last year, they slowed the number of confirmations down to a trickle. Only 17 judges were confirmed. In contrast, when the Senate has had Democratic majorities and the White House has had Republican Presidents, Democrats have always been willing to consider and confirm much larger numbers of nominees. Democrats have not played politics with the judiciary; they understand that partisan disagreements should not be allowed to keep judicial posts unfilled. The Republican filibuster against judges has only grown in this Congress--so far, not one single judge has been confirmed. As a result, we are reaching a crisis situation in courts around the country. The remaining judges are having an increasingly difficult time in handling the caseload. Republicans publicly deny that they are stalling on nominations, but privately some of them have told us that what they want is an agreement that they be allowed to pick a certain percentage of the nominees; they do not want just "Democrat" judges to be put on the bench. We will not agree to that unprecedented demand. We urge the confirmation of Merrick Garland, and we urge our Republican colleagues to stop blocking the confirmation of other deserving nominees.

Those opposing confirmation contended:

In our opinion, Merrick Garland is qualified to be a Federal judge. We only oppose his nomination because he has been nominated for an unnecessary post. The District Circuit currently is operating well with 10 judges; another judge is not needed. The fact that this circuit is authorized to have 12 judges is irrelevant; the question Senators need to consider is whether it needs more than 10 judges. We have been studying this matter very closely for the past 2 years and have come to the firm conclusion that it does not. The first point that must be made is that the District Circuit has by far the lowest caseload per judge in the country, at just 123 cases per judge. The next lowest is the tenth circuit, at 216 cases per judge. The highest caseload, 575, is in the 11th Circuit. The average caseload around the country is three times higher than it is in the District Circuit. In response to this fact, our colleagues have countered that the District Circuit has to hear a disproportionately high number of complex regulatory cases. Granted, but we note that many other types of cases that are disproportionately considered in other districts are equally or even more complex. For instance, the Eleventh Circuit has to hear a large number of complex criminal cases involving international drug smuggling, and the Second Circuit has to consider a disproportionate number of commercial litigation cases. The next argument made by our colleagues is that they are willing to reduce the number of judges on the District Circuit to 11, but not to 10. They note that last year the former chief justice of that circuit said that the decline in caseload from the mid-1980s justified that decrease. However, our colleagues should also be aware that in this last year the number of cases considered has dropped by another 15 percent, and the number of regulatory cases our colleagues say are so complex has declined by 23 percent. Our colleagues should also be aware that the court is not really at 10 judges, because one of the recently retired judges has gone on senior status, which means that he will hear nearly a full complement of cases but he will not assume responsibility for administrative work. In effect, the District Circuit is now at 10.5 judges. In our opinion, the facts just do not support the conclusion that we should pay the approximately $1 million yearly cost of appointing another judge to the District Circuit. Without any prejudice against Merrick Garland, we cannot support his confirmation to this unnecessary post.